

**TO:           Honorable Anthony J. Scirica, Chair**  
**Standing Committee on Rules of Practice**  
**and Procedure**

**FROM:       Honorable Jerry E. Smith, Chair**  
**Advisory Committee on Evidence Rules**

**DATE:       May 5, 2003**

**RE:           Report of the Advisory Committee on Evidence**  
**Rules**

## **I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on April 25, 2003, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 804(b)(3), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for the proposed amendment to Rule 804(b)(3).

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## **II. Action Item**

### **Recommendation To Forward the Proposed Amendment to Evidence Rule 804(b)(3) to the Judicial Conference**

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule 804(b)(3) in order to correct the potential unconstitutionality of that Rule in cases where declarations against penal interest are offered against a criminal defendant. The amendment is made necessary by Supreme Court decisions analyzing the relationship between the Confrontation Clause and hearsay admitted against an accused under a hearsay exception. Specifically, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court declared that the hearsay exception for declarations against penal interest is not “firmly rooted” and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Furthermore, under *Lilly* and *Idaho v. Wright*, 497 U.S. 805 (1990), a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears “particularized guarantees of trustworthiness.” And the *Lilly* Court held that this standard of “particularized guarantees” would not be satisfied simply because the statement was disserving to the declarant’s penal interest. To satisfy the Confrontation Clause, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant’s penal interest. It does not impose any additional evidentiary requirement.

Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied to admit evidence that would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Evidence Rules Committee has determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the other categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"—the exception being Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri*, 207 F.3d 412 (7<sup>th</sup> Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds).

The language added to the amendment concerning "particularized guarantees of trustworthiness" is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. The addition of this language would guarantee that the Rule would comport with the Constitution in criminal cases,

without imposing on the government any evidentiary requirement that it is not already required to bear.

The Evidence Rules Committee carefully considered the public comment on the proposed amendment and held a public hearing on the amendment as part of its Spring 2003 meeting. While the comments received generally were favorable, the Committee agreed with two important suggestions for improvement to the proposed amendment:

1. The proposal released for public comment would have extended the corroborating circumstances requirement to declarations against penal interest offered in civil cases. The Committee has deleted this language in response to public comment indicating that it would make it unreasonably difficult to present some important evidence in certain civil cases, and reasoning that the extension was not supported by the original intent of Rule 804(b)(3).

2. The proposal released for public comment did not attempt to provide guidance on the difference between the two evidentiary standards set forth in the Rule, i.e., “corroborating circumstances” (applicable to statements against penal interest offered by the accused) and “particularized guarantees of trustworthiness” (applicable to statements against penal interest offered by the prosecution). The Committee has added a paragraph to the Committee Note that distinguishes the two standards, in response to public comment suggesting the need for more guidance to courts and litigants.

The proposed amendment to Rule 804(b)(3) is set forth as an attachment to this Report.

***Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3), as modified following publication, be approved and forwarded to the Judicial Conference.***

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